26. API believes that even if the Commission's conclusions were based upon direct statements on the face of the applications indicating that commercial service is intended, the true commercial interest in the 932/941 MHz band -- if any -- is far less than that estimated by the Commission. That is because many of the applications for 932/941 MHz MAS channels were generated by "application mills" which -- with less than full candor -- convinced commercial entities that, like in the cellular context, great profits could be earned through obtaining and reselling MAS licenses. In fact, the Commission itself was so concerned about the potential filing of speculative applications for MAS channels in the 932/941 MHz band that it included a "Special Note to Private Radio Applicants" in its Public Notice announcing revised filing windows for submitting applications to operate in the band. The "Special Note" read as follows:

> We also take this opportunity to correct certain misconceptions that we understand are pervasive regarding the potential use and value of [MAS] channels for private radio services. Potential applicants for these channels are urged to be cautious of claims made by application preparers that MAS licensees could realize windfall profits. Private radio MAS channels are not suitable for providing a communications service to a large sector of the general public, such as channels the Commission has allocated for cellular, paging, or [SMR] services. Instead, potential users of MAS channels are limited to various types of

> businesses with specialized communications needs, generally internal to those businesses.[22/]

27. It would hardly be surprising if many applicants, having already paid for the preparation of their applications or perhaps in ignorance of the Commission's warning, went ahead and filed their speculative applications for 932/941 MHz MAS channels. What is surprising, on the other hand, is that the Commission now is using these same applications as the basis for concluding not only that 932/941 MHz MAS spectrum is suitable for commercial services, but also that it is primarily a subscriber-based service -- conclusions that are the very opposite of what the Commission so forcefully (but unsuccessfully) attempted to explain to applicants in its "Special Note." Given this fully circular reasoning by the Commission, API believes that if the Commission were to move forward with its proposed auction of the 932/941 MHz MAS band to commercial licensees, it will be sorely disappointed in the results.

22/ Revised Filing Window for Point-to-Multipoint Channels in the 900 MHz Government/Non-Government Fixed Service, GEN Docket No. 82-243, *Public Notice*, 6 FCC Rcd 7242 (Nov. 27, 1991) (emphasis added).

2. There Should be a Set-Aside in the 932/941 MHz MAS Band for Private Users

28. The Commission acknowledges that its proposed dismissal of the more than 50,000 pending applications in the 932/941 MHz MAS band would be "contrary to the expectations of those applicants who, in good faith, expected to participate in a lottery and, if successful, provide MAS service." Notice at ¶ 58. Among these applicants are 14 of the 29 respondents to API's survey, who filed a total of more than 85 applications for this spectrum. The Commission insists, however, that "these applicants had ample opportunity to carry out their business plans with little additional expenditure by applying for other MAS channels" and that "throughout the period the 50,000 MAS applications have been pending, spectrum was available that is substitutable in every respect." Notice at ¶ 57. This is simply incorrect. The only "substitutable" paired private MAS spectrum available is the 928/952 MHz band -- a band that the Commission found in 1987 to be so "saturated in some areas" that it warranted the creation of new MAS spectrum in the 932/941 MHz band.[23/]

29. The Commission does not and, indeed, cannot state that the 928/952 MHz MAS band has become less

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[23/] See supra at ¶¶ 18-19.

saturated since 1987. That is because even a cursory examination of its data base would indicate that the band has, if anything, become more saturated in many areas. Of the 29 respondents to API's survey, 19 reported that one or more of their MASs are licensed with a Short Space Agreement, i.e., with the consent of a nearby licensee to relax the Commission's co-channel separation requirements.[24/] The prevalence of such arrangements is evidence of a high level of congestion in the 928/952 MHz band. This need for short-spacing is not costless; rather, it imposes significant transactional and administrative expenses upon MAS applicants and unduly delays their licensing efforts.

30. Moreover, because potential licensees have not always been able to obtain the necessary third-party consent to short-spacing, many have had to forego their planned systems and attempt to meet their communications requirements with unlicensed spread spectrum equipment. The vast majority (i.e., 25 of 29) of the respondents to API's survey stated that they have installed MASs since 1992 which employ such unlicensed equipment. By no stretch of the imagination, however, is this equipment "substitutable in every respect" for licensed MASs. While MAS licensees are

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[24/] Specifically, these 19 respondents indicated that a total of 81 of their MASs were licensed with Short Space Agreements.

accorded legal protection from interference under the Commission's rules, the users of spread spectrum equipment have no such protection and, in fact, often encounter serious interference problems that impair the reliability of their systems. Given the important functions that these systems are meant to serve -- including the protection of life, property and the environment -- it is critical that adequate licensed spectrum be made available.

31. Against this backdrop, the Commission's proposal to dismiss all of the pending applications and redesignate the 932/941 MHz band for commercial use, without providing any alternative uncluttered spectrum for private MAS users, is plainly unacceptable. In order to meet the substantial and growing demand of private users for MAS frequencies,[25/] API recommends that the Commission set aside at least twenty of the forty MAS channels in the 932/941 MHz band for exclusive use by POFS eligibles and that it resolve mutually exclusive applications for this spectrum through random selection. Otherwise, the Commission will, in its allocation of this band, be according more weight to a host of speculative commercial applications than to a wealth of

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[25/] As discussed at paragraph 9, supra, the API survey respondents alone intend to install many hundreds of MASs over the next decade. The total demand of all private MAS users undoubtedly is far greater.

undisputed evidence of actual past, current and future requirements for private MAS channels.

32. In light of the fact that more than five years already have elapsed since the pending applications for the 932/941 MHz MAS channels were filed, API also asks that the Commission -- should it adopt API's proposal for a private set-aside -- accept, process and take final action on new applications for MAS channels included in this private set-aside on an expedited basis. With respect to the dismissal of the pending applications, API urges the Commission to return the filing fees associated with these applications, as has been the Commission's practice when returning applications for other services.[26/] Because so many years have passed in this instance, principles of fairness also require that interest be paid.

33. In the event that the Commission, notwithstanding the overwhelming support in the record for a private set-aside in the 932/941 MHz MAS band, declines to designate any of these channels for private purposes, it

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[26/] See, e.g., In the Matter of Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, FCC 97-57, *Third Report and Order; Fifth Notice of Proposed Rulemaking*, at ¶ 197 (adopted Feb. 19, 1997) (pending applications for 220 MHz service to be returned with appropriate filing fees).

should at a minimum allow private users to participate in its auction for these channels and to purchase partitioned or disaggregated portions of auctioned licenses.[27/] Relaxing the Commission's eligibility requirements in this manner would be consistent with the agency's goal of allocating spectrum to its highest valued use and could provide some private users with an opportunity to acquire the MAS spectrum that they so acutely need.[28/] API wishes to make it clear, however, that the opening of the Commission's auction doors to private users is by no means a satisfactory substitute for an exclusive set-aside of private channels in the 932/941 MHz MAS band. Because it is infeasible for the vast majority of private licensees to bid at auction against entities that are seeking licenses for commercial gain, only

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[27/] This approach has been adopted for the Commission's auction of the Wireless Communications Service ("WCS"), which concluded on April 25, 1997, and its upcoming auction of nationwide and regional licenses in the 220 MHz service. In each instance, the Commission's rules provide that both private and commercial licensees may bid on the designated spectrum. API also requests that in the Commission's 932/941 MHz MAS auction, like in the Commission's WCS auction, the Gulf of Mexico should be included among the geographic areas for which licenses are assigned.

[28/] In order for private users to be able to participate at auction or obtain licenses through partitioning or disaggregation, the Commission will need to clarify that the winners of private MAS licenses will be subject to internal construction deadlines, rather than the requirement (applicable to commercial licensees) that coverage be provided within a specified time period to a certain percentage of the population in a licensee's service area.

a private set-aside will ensure adequate spectrum for the vital communications requirements of private MAS users.

C. The Commission's Proposed Designation of the 928/959 MHz MAS Band for Subscriber-Based Services Is Impractical and Unwarranted

34. API believes that there is insufficient demand for commercial MAS channels to justify the redesignation of the 928/959 MHz band exclusively for subscriber-based services. As discussed above, there is evidence that many of the supposed commercial applications for assignments from the 932/941 MHz band are purely speculative. In addition, based upon the licensing and operational experience of API's members, it appears that a number of the 928/959 MHz MAS channels licensed to commercial providers have never been constructed and/or placed in service. Thus, API encourages the Commission to investigate the nature of actual operations in the 928/959 MHz band, rather than simply the identity of the parties that are licensed to operate on these channels, before reaching any final conclusions about the future allocation of the band.[29/] Such an analysis likely would lead to the conclusion that the designation of

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[29/] With regard to this MAS band (as well as the 928/952/956 MHz bands, as discussed above), API further urges the Commission to initiate efforts to enforce its construction requirements. Otherwise, spectrum that could be of vital use to private licensees will remain idle indefinitely.

several channels in the 932/941 MHz band for commercial MAS use will be more than adequate to meet any existing and future demand for such channels.

35. It also is worth noting that the 928/959 MHz MAS band, like the 928/952 MHz band, is extremely congested in many areas. These channels are licensed not only for commercial purposes, but also to a number of private licensees for internal communications.[30/] API agrees with the Commission's proposal that any geographic area licensees in the 928/959 MHz band should be required to protect incumbent operations against interference.[31/] Given the current level of saturation in the band, however, coupled with the need to protect incumbents, API expects that there will not be enough unencumbered spectrum in many geographic license areas for commercial entities to provide reliable and widespread subscriber-based services.

36. In short, API believes that the only MAS spectrum which may be appropriate for the auctioning of geographic

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30/ For example, 14 of the respondents to API's survey indicated that they are licensed to operate a total of approximately 100 MASs in the 928/959 MHz band.

31/ Additionally, incumbents should, as the Commission proposed, be allowed to modify existing systems and add new transmitters as long as the signal level is not increased beyond the incumbent's 25-mile service area. See Notice at ¶¶ 19-20.

licenses is the unsaturated 932/941 MHz band (provided that a number of channels in the band are set aside for private use).[32/] Because the auctioning of such channels could lead to the speculative licensing of any remaining commercial channels available on a site-by-site/first come-first served basis, API recommends that the Commission reallocate the currently unlicensed portions of the 928/959 MHz MAS band for private use. This measure also would serve to alleviate some (but not all) of the unmet demand for private MAS channels demonstrated by API's survey.

D. The Commission Should Continue to License Private MAS Channels on a Site-by-Site Basis

37. A large majority of the respondents to API's survey favor the use of site-by-site, rather than geographic, licensing for all types of private MAS channels.[33/] As the basis for this preference, many of these

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[32/] API's Comments should not be construed, however, as supporting the Commission's proposal to auction, rather than lottery, commercial licenses for the 932/941 MHz MAS band. To the extent that there are entities who filed applications for this spectrum with legitimate intentions to construct and operate commercial systems, the dismissal of these applications more than five years later is, like the dismissal of the private MAS applications, patently unfair.

[33/] Of the 29 respondents, 20 favored site-by-site licensing, 7 favored geographic licensing, one expressed a preference for site-by-site licensing of occupied bands and geographic licensing of the 932/941 MHz band, and one did not provide any answer to the questions regarding this

(continued...)

respondents explained that private MAS systems typically require access to numerous different channels within a frequency band, covering specific and often limited areas of need, rather than a common frequency throughout a large geographic area. The existing site-by-site licensing approach enables a private MAS licensee to tailor its system to its individual coverage requirements and enhances the licensee's ability to avoid co-channel interference within its own MAS operations.

38. It clearly would be spectrum-inefficient, on the other hand, to grant wide area licenses to private MAS users that may only need coverage in sparsely populated areas in which other conventional telecommunications services are not available. Put another way, it does not make sense for one licensee to control MAS frequency pairs that could instead be utilized by several different parties throughout a particular geographic area. Private MAS users also are concerned that if wide-area geographic licensing were adopted, it may, in essence, force them to become "subtenants" on spectrum licensed by other parties, resulting in an increase in operating costs and a decrease in control over their operations.

[33/] (...continued)
topic.

39. Notwithstanding the foregoing, a minority of private MAS users have stated a preference for geographic area licensing. API believes, however, that these private users presume that geographic licenses for private MAS channels would be defined not by large Economic Areas ("EAs"), as proposed by the Commission for commercial licensees, but by smaller regions that more closely conform to an oil or natural gas pipeline's area of operations. The use of market-based geographic licensing regions such as EAs is appropriate only for licensees that intend to provide service to the public for profit.

40. API also notes that in the 928/952/956 MHz MAS bands, as in the 928/959 MHz MAS band (see discussion, supra), congestion from incumbent operations will render geographic licensing infeasible in many areas; for this reason, as well as those set forth above, the existing site-by-site licensing approach should be continued in these bands. With respect to API's proposed private set-aside in the 932/941 MHz MAS band, API recommends that the Commission license these channels, too, on a site-by-site basis. Nevertheless, API would be amenable to the assignment of a small percentage of these channels on a geographic basis, provided that private licensees could have input in delineating the geographic service areas that best meet their needs and that partitioning and disaggregation would

be permitted. In no event, however, should any private channels be assigned through competitive bidding.

III. CONCLUSION

API's survey results demonstrate a substantial and growing need for private MAS channels. While the Commission recognized this need in the past and sought to fulfill it through the designation of new MAS spectrum in the 932/941 MHz band, it now threatens to destroy this important remedy for the sole benefit of commercial providers who, for the most part, have never shown any legitimate interest in constructing and operating MAS channels. To accommodate the critical and long-standing MAS requirements of private licensees, API implores the Commission to: (1) set aside twenty MAS channels in the 932/941 MHz band for private use; (2) designate the 928/952/956 MHz and 928/959 MHz bands for private use and initiate efforts to ensure that existing licensees in these bands comply with the Commission's construction requirements; and (3) recognize that geographic licensing based upon large market areas is inappropriate for private MAS channels.

WHEREFORE, THE PREMISES CONSIDERED, the American Petroleum Institute respectfully submits the foregoing

Comments and urges the Federal Communications Commission to act in a manner consistent with the views expressed herein.

Respectfully submitted,

THE AMERICAN PETROLEUM INSTITUTE

By: Wayne V. Black

Wayne V. Black
Nicole B. Donath
Keller and Heckman LLP
1001 G Street, Suite 500 West
Washington, D.C. 20001
(202) 434-4100

Its Attorneys

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